IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	Criminal Case No. 1:05CR53
	)	
v.	)	The Hon. Liam O'Grady
	)	
AHMED OMAR ABU ALI,	)	
	)	
Defendant	)	

GOVERNMENT'S POSITION ON PRETRIAL DETENTION

The United States hereby moves the Court to order the pretrial detention of defendant Ahmed Omar Abu Ali on the grounds that he presents an exceptionally grave danger to the community and a serious risk of flight. The government respectfully submits that no condition or combination of conditions will reasonably assure the defendant's appearance for trial and the safety of the community, that there is a rebuttable presumption against release, and that the defendant should be detained pending trial.

I. NATURE OF THE OFFENSES CHARGED

The seriousness of the charges contained in the Indictment against the defendant militates strongly in favor of detention.[1] Most notably, the defendant has been indicted on charges that he conspired to provide material support and resources to al-Qaeda, a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B, and that he did, in fact, provide such material support and resources to al-Qaeda.[2]

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[1] *See* 18 U.S.C. § 3142(g)(1) (nature and circumstances of offense charged among factors to be considered by court in determining whether pretrial detention is appropriate).

[2] The defendant also has been charged with conspiracy to provide material support and resources to terrorists in violation of 18 U.S.C. § 2339A; actually providing material support and

Counts 1 through 4 of the Indictment, which concern the defendant's material support to al-Qaeda, constitute crimes of violence.[3] *See United States v. Goba*, 240 F. Supp.2d 242, 244 (W.D.N.Y. 2003) (material support to al-Qaeda in violation of 18 U.S.C. § 2339B constituted crime of violence); *see also United States v. Khan*, 309 F. Supp. 2d 789, 823 (E.D. Va. 2004) (providing material support to terrorist organization Lashkar-e-Taiba was crime of violence for purposes of 18 U.S.C. § 924(c)(3)[4]); *United States v. Lindh*, 212 F. Supp.2d 541, 579 (E.D. Va. 2002) (conspiracy to provide material support to Taliban and al-Qaeda in violation of 18 U.S.C. § 2339B, and actually providing material support, were crimes of violence for purposes of 18 U.S.C. § 924(c)). The nature of the offenses charged, therefore, supports pretrial detention of the defendant. *See* 18 U.S.C. § 3142(g)(1).

II. STANDARDS OF PROOF

In accordance with 18 U.S.C. § 3142(e), a court must order the detention of a person pending trial where no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of other persons in the community.

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resources to terrorists in violation of 18 U.S.C. § 2339A; contributing services to al-Qaeda, a specially designated terrorist, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 595.204; and receiving funds and services from al-Qaeda, a specially designated terrorist, in violation of 50 U.S.C. § 1705(b) and 31 C.F.R. § 595.204.

[3] For purposes of 18 U.S.C. § 3142(g)(1), the term "crime of violence" means "(A) an offense that has an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense . . . ." 18 U.S.C. § 3156(a)(4).

[4] As the district court in *Goba* noted, the definitions of "crime of violence" contained in 18 U.S.C. § 3156(a)(4)(B) and 18 U.S.C. § 924(c)(3) are "essentially the same definition . . . ." *Goba*, 240 F. Supp.2d at 250 n.12.

The standard of proof for detention on the grounds of danger to the community is clear and convincing evidence. *See* 18 U.S.C. § 3142(f)(2); *United States v. Clark*, 865 F.2d 1433, 1435 (4th Cir. 1989).

The standard of proof for detention on the grounds of risk of flight is preponderance of the evidence. *See United States v. Stewart*, 19 Fed. Appx. 46, 48 (4th Cir. 2001) (unpublished) (citing *United States v. Hazime*, 762 F.2d 34, 37 (6th Cir. 1985)); *see also United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996); *United States v. Jackson*, 845 F.2d 1262, 1264 n.3 (5th Cir. 1988).

III. REBUTTABLE PRESUMPTION AGAINST PRETRIAL RELEASE

The Intelligence Reform and Terrorism Act of 2004 ("the Act"), enacted into law on December 17, 2004, amended 18 U.S.C. § 3142(e) to establish a rebuttal presumption against pretrial release in cases involving terrorism-related charges such as those pending against the defendant. Specifically, the Act created a new presumption in favor of pretrial detention for any offense listed in 18 § 2332b(g)(5)(B). Among the offenses listed in 18 U.S.C. § 2332b(g)(5)(B) are 18 U.S.C. § 2339B and 18 U.S.C. § 2339A, with which the defendant is charged in Counts 1 through 4 of the pending Indictment. Therefore, subject to rebuttal by the defendant,[5] it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the defendant as required and the safety of the community where there is probable cause to

[5] This presumption imposes on the defendant a burden of production. *See, e.g., United States v. Moss*, 887 F.2d 333, 338 (1st Cir. 1989); *United States v. Hare*, 873 F.2d 796, 798 (5th Cir. 1989); *United States v. Martir*, 782 F.2d 1141, 1142 (2d Cir. 1986). Even if rebutted, the presumption remains in the case as a finding mitigating against release, to be weighed with other relevant factors. *See United States v. Perez-Franco*, 839 F.2d 867 870 (1st Cir. 1988); *United States v. Fortna*, 769 F.2d 243, 251 (5th Cir. 1985); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985).

believe that the defendant committed violations of 18 U.S.C. § 2339B and 18 U.S.C. § 2339A. *See* 18 U.S.C. § 3142(e). *Accord United States v. Williams*, 753 F.2d 329,332 (4th Cir. 1985) (rebuttable presumption for narcotics offenses).

IV. DANGER TO THE COMMUNITY

There is clear and convincing evidence that the defendant presents an exceptionally grave danger to the community. In returning the Indictment against the defendant, the grand jury already has found probable cause[6] that the defendant committed the offense of providing material support and resources to the terrorist organization al-Qaeda, based on the following information contained in the Indictment:

- Between in or around September 2002 and on or about June 9, 2003, the defendant joined a clandestine al-Qaeda cell in Saudi Arabia.
- In joining al-Qaeda, it was the defendant's intent to become a planner of terrorist operations like Mohammed Atta and Khalid Shaykh Muhammad, well known al-Qaeda terrorists associated with the terrorist attacks on the United States on September 11, 2001.
- The defendant discussed plans for assassinating President of the United States George W. Bush with a member of the al-Qaeda cell (identified in the Indictment as Coconspirator #2).[7] Specifically, the defendant and Coconspirator #2 discussed two options for assassinating the President: (1) an operation in which the defendant would get close

[6] Because the grand jury already has found probable cause that the defendant committed violations of 18 U.S.C. §§ 2339A and 2339B (see discussion below), the government respectfully submits that there is no need for the Court to assess whether probable cause exists for those offenses.

[7] The government proffers that Coconspirator #2 later was killed in a shoot-out with Saudi law enforcement authorities in or around September 2003.

enough to the President to shoot him on the street; and (2) an operation in which the defendant would detonate a car bomb.

- The defendant obtained a religious blessing to conduct the assassination of President Bush from a Saudi cleric.
- The defendant offered himself to members of the al-Qaeda cell in Saudi Arabia as an individual committed to furthering the objectives of al-Qaeda.
- The defendant moved in with other members of the al-Qaeda cell and resided with them at multiple locations in Saudi Arabia.
- The defendant received money from a senior member of the al-Qaeda cell (identified in the Indictment as Coconspirator #4) to purchase a laptop computer and cellular telephone, and, for the purposes of providing material support and resources to al-Qaeda, he used that money to purchase a laptop computer and cellular telephone.
- Between in or around September 2002 and June 9, 2003, the defendant received training from al-Qaeda cell members in Saudi Arabia in weapons (including hand grenades), explosives, and document forgery.[8]

In addition, as set forth in the Indictment, on or about June 16, 2003, the defendant possessed\ at his residence in Falls Church, Virginia, the following items:

- An undated document praising the Taliban leader Mullah Omar and the terrorist attacks on September 11, 2001, and condemning U.S. military action in Afghanistan. The government proffers that this document includes the following:

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[8] *See Goba*, 240 F. Supp.2d at 254 (affirming magistrate judge's detention order based partly on finding that defendants received training in weapons and explosives from al-Qaeda).

> Nearly ten months ago, the World was witness to a momentous attack against the greatest Empire of modern times. On September 11, 2001, a little past nine in the morning, time stood still. In a brief moment, the United States of America suffered the pain the people of Iraq and Palestine endure on a daily basis . . . .
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> In one of the most sophisticated, well-planned attacks seen in modern times, the Twin Towers, the source of providing $5 Billion in annual aid to Israel, were destroyed. And what is often conveniently forgotten is that the third plane turned the Pentagon, the symbol of American military supremacy, into a rhombus, whilst the fourth plane was shot down by the US themselves. In barber shops, cafes, markets, everywhere people were whispering celebrations . . . .
>
> Within days of the attack, without a shred of evidence, the blame was laid firmly and squarely on one man, Usama Bin Laden. The US in its arrogance demanded that Mullah Omar, the Leader of the Believers hand Usama Bin Laden over to them, or face the consequences.
>
> Clearly George Bush has never met Mullah Omar; had he done [so] he may have realised that the Prince of Believers fears no one but Allah, Lord of the Worlds. Mullah Omar would rather walk through a blazing fire than betray his friend and guest. . . . Mullah Omar, the Mujahideen of both Al-Qaida and Taliban chose to endure the pain of 15,000 lb 'Daisy Cutter' bombs in order to protect their friend and hold fast to the principles of their religion. Men with this courage, honour and integrity are indeed diamonds amongst the rocks . . . . Will the mothers of the Ummah raise more men of this calibre?

- A book in Arabic written by senior al-Qaeda official Ayman al-Zawahiri, Usama bin Laden's deputy, in which al-Zawahiri characterizes democracy as a new religion that must be destroyed by war, describes anyone who supports democracy as an infidel, and condemns the Muslim Brotherhood for renouncing violent *jihad* as a means to establishing an Islamic state.
- Audio tapes in Arabic promoting violent *jihad*, the killing of Jews, and a battle by Muslims against Christians and Jews.[9]

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[9] *See Goba*, 240 F. Supp.2d at 256 (affirming magistrate judge's detention order based partly on discovery at defendant's last known U.S. residence of cassette tapes entitled "Call to Jihad" or "Invitation to Jihad").

The defendant's possession of these items at his residence makes it clear that even before he departed the United States for Saudi Arabia in September 2002, he already had come to embrace and support the violent ideology and objectives of al-Qaeda.

V. RISK OF FLIGHT

There is substantial evidence that the defendant would flee this jurisdiction, and the United States, if he were released pending trial. First, the defendant has been charged with extremely serious offenses. If convicted, he faces a maximum potential penalty of 80 years of imprisonment. Thus, he has a strong incentive to flee the United States in order to avoid a possible conviction at trial. *See Goba*, 240 F. Supp.2d at 244. Second, the defendant has substantial ties overseas. The government proffers that the defendant lived in Jordan from 1993 to 1997, and that he has close family members residing in Jordan. Indeed, the defendant has admitted that he possesses Jordanian citizenship in addition to his U.S. citizenship[10] and, in a November 2003 meeting with the U.S. Consul in Riyadh, inquired about the procedures for renouncing his U.S. citizenship. Third, the government proffers that the defendant has communicated his desire, following his arrest in Saudi Arabia, *not* to return to the United States and, instead, to go to a country in western Europe.[11] Fourth, in addition to his lengthy stay in Jordan in the 1990's, the defendant has traveled abroad extensively during the past few years. Fifth, there is reason to believe that, if released pending trial, he would reestablish contact with

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[10] The government proffers that the defendant has admitted that he possessed a Jordanian passport that he had kept secret from the United States Government.

[11] The government proffers that in or around May 2004, the defendant indicated to the U.S. Consul in Riyadh that if he were deported from Saudi Arabia, he would not want to return to the United States but, instead, would prefer to live in Sweden.

terrorist confederates still at large who could facilitate his flight. Finally, the defendant has the ability to flee the United States, having received training in document forgery from an al-Qaeda cell in Saudi Arabia. *See United States v. El-Hage*, 213 F.3d at 80 (preponderance of evidence showed risk of flight despite defendant having American citizenship, wife, and seven small children, because defendant had access to false documents, extensive history of travel and residence in other countries, and alleged ties to extensive and well-organized terrorist group).

VI. DEFENDANT'S CLAIMS OF TORTURE

At the defendant's initial appearance before this Court on February 22, 2005, he claimed, through his attorney, that he was tortured while in custody in Saudi Arabia. Specifically, he claimed that he had been whipped on his back.

As a preliminary matter, the defendant's claim of torture is not relevant to a detention proceeding. A detention hearing is not the juncture at which to raise claims of mistreatment by a foreign government, and the Court should disregard these claims for purposes of the motion before it. The defendant remains free to raise these claims at the appropriate time in the context of a motion to suppress.

Should the Court, however, consider the merits of the defendant's claims, the government submits that there is no credible evidence to support those claims, and that they are untrue. Not until his initial appearance, with members of the news media present, did the defendant claim that he had been physically mistreated while in Saudi custody. Moreover, the government proffers the following information that directly contradicts the defendant's claims of physical mistreatment:

- An American doctor gave the defendant a thorough physical examination on or about February 21, 2005, after the defendant had been transferred by the Saudi Government to U.S. custody. The doctor found no evidence of any physical mistreatment on the defendant's back or any other part of his body. Moreover, the doctor specifically asked the defendant if he had been abused or harmed in any way, and the defendant said no.
- The Consul at the U.S. embassy in Riyadh, an employee of the Department of State, met personally with the defendant on several occasions during his detention in Saudi Arabia. On no occasion did the defendant complain of any physical or psychological mistreatment. To the contrary, the defendant advised the Consul – to whom he could have confided claims of mistreatment to prompt intervention on his behalf by the U.S. Government – that he was being well treated. For example, during the Consul's initial visit with the defendant on July 8, 2003, the defendant used the words "excellent," "kind," and "humane" to describe his treatment. During a subsequent visit in August 2003, the defendant remarked that he had access to a gym with fitness machines and was permitted to play soccer with other inmates in a gym area. The Consul routinely recorded after each visit that the defendant "was in good health and spirits. There was nothing in his physical appearance, demeanor, or speech to indicate mistreatment or abuse." Similarly, in several reports regarding visits in late 2003 and 2004, the Consul reported that the defendant told him that Saudi authorities were treating him well, and that he made no allegations of mistreatment.

- In September 2003, FBI agents interviewed the defendant several times over a four-day period. The defendant appeared to be in good physical condition during those interviews, and at no time did he claim he had been physically mistreated by Saudi authorities.
- On or about February 21, 2005, the U.S. Consul General spoke with the defendant after he was in U.S. custody and situated aboard an aircraft for the return trip to the United States. During their conversation, the defendant made no claim of physical abuse.
- At no time during the lengthy plane trip back to the United States on February 21, 2005, did the defendant complain of any mistreatment by Saudi authorities.

The government does not lightly consider allegations of torture by a U.S. citizen who has been held in foreign custody. In this case, however, the weight of the evidence strongly indicates that the defendant's claims of mistreatment are an utter fabrication intended to divert attention from his criminal involvement with an al-Qaeda cell in Saudi Arabia.

VII. CONCLUSION

The defendant, a United States citizen, joined an al-Qaeda cell overseas after it had become well established that al-Qaeda was responsible for the September 11, 2001, terrorist attacks on the United States. He obtained terrorist training from members of the al-Qaeda cell, and participated in planning to assassinate the President of the United States and commit other terrorist acts. He is demonstrably a grave danger to the community – and to the nation. At the same time, he presents a serious risk of flight. There is no condition, or combination of

conditions, that will adequately safeguard the American people or assure the defendant's appearance for trial.[12] Accordingly, the defendant should be detained pending trial.

Respectfully submitted,

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[12] *See Goba*, 240 F. Supp.2d at 257-58 (risk of flight and danger to community outweighed fact that each defendant shared common factor of being a U.S. citizen, having longstanding ties to Lackawanna, New York, having family and friends living in and around Western New York, and having no significant criminal history).